United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

Affidavit

75-6050

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6050

ARTHUR N. ECONOMOU, ARTHUR N. ECONOMOU & CO., INC. and THE AMERICAN BOARD OF TRADE, INC.,
Plaintiffs-Appellants,

—v.—

UNITED STATES DEPARTMENT OF AGRICULTURE; EARL L. BUTZ, Secretary of Agriculture; RICHARD T. LYNG, Assistant Secretary of Agriculture, COMMODITY EXCHANGE AUTHORITY; ALEX C. CALDWELL, Act Administrator, Commodity Exchange Authority; CHARLES E. ROBINSON, Director, Compliance Division, Commodity Exchange Authority; RICHARD E. KIRCHHOFF, Deputy Director, Registration and Audit Division, Commodity Exchange Authority; JACK W. BAIN, Chief Hearing Examiner, United States Department of Agriculture; RICHARD W. DAVIS JR., Counsel, United States Department of Agriculture; T. REED MCMINN, Regional Administrator, New York Regional Office, Commodity Exchange Authority; CLEMENT GROSS, Auditor, Commodity Exchange Authority; MURRAY A. WOLKIS, Auditor, Commodity Exchange Authority; EDWARD F. FITZPATRICK, Auditor, Commodity Exchange Authority, DONALD A. CAMPBELL, Judicial Officer, United States Department of Agriculture,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS-APPELLEES' PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC*

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BRLS

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Defendants-Appellees.

DEFENDANTS-APPELLEES' PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC*

Preliminary Statement

Pursuant to Rule 40 and 35(b) of the Federal Rules of Appellate Procedure, defendants-appellees hereby petition for rehearing and suggest the appropriateness of a rehearing *en banc* of the decision of a panel of this Court dated April 23, 1976 which, reversing the District Court for the Southern District of New York, held that judicial and prosecutorial officials of administrative agencies were not entitled to absolute immunity from civil damage suits.

Reasons For This Petition

The decision of the panel, if allowed to stand, will have a major and far-reaching impact on all federal administrative agencies, to whom as a group is entrusted the primary responsibility for regulation of the most important areas of the country's commerce and business.

It is essential for commissioners and judges at agencies such as the Securities and Exchange Commission, the Federal Trade Commission, and the Food and Drug Administration, as well as the Commodity Exchange Authority, to be able to decide the important cases which come before them, and for officials at these agencies to be able to initiate and conduct these cases, without the fear of having to defend themselves against multi-million dollar damage suits, in the same way the Supreme Court has deemed it essential for judges and prosecutors in the judicial branch to be free from such suits. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Imbler* v. *Pachtman*, 44 U.S.L.W. 2250 (1976). The panel's sweeping decision, rendered in the context of a purely documentary proceeding under the Commodity Exchange Act, that the considerations which led the Supreme Court to confer absolute immunity on judges and prosecutors in the

judicial branch do not apply to judges and prosecutors in administrative agencies is based on what we respectfully consider to be faulty reasoning and insufficient consideration of the ramifications of the decision beyond the facts of this particular case.

In addition, the panel's decision was erroneous in concluding, as to common law claims, that *Barr* v. *Matteo*, 360 U.S. 564 (1959) is not still good law, and in rejecting the prior decisions of this Court in *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d 655 (2d Cir. 1962), *cert. denied*, 374 U.S. 827 (1963) and *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 399 U.S. 949 (1950).

Statement of the Case

This suit was brought by plaintiff Arthur N. Economou & Co. Inc., a registered futures commission merchant, and its controlling stockholder, plaintiff Arthur N. Economou. Ten causes of action were asserted under various provisions of the United States Constitution and under common law. Plaintiffs sought to recover damages from, *inter alia*, the administrative hearing examiner and judicial officer who decided the administrative proceedings under the Commodity Exchange Act adversely to plaintiffs, officials of the Department of Agriculture who prosecuted the claims and other officials who had conducted the investigation which produced the information on which the case was prosecuted and decided. The district court

granted the defendants' motion to dismiss,* holding that the officials were absolutely immune from suit.**

On appeal, the panel of this Court reversed the judgment in favor of the defendant officials and remanded for further proceedings. Relying upon recent decisions of the Supreme Court involving the immunity of state officials sued under 42 U.S.C. § 1983, *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) and *Wood* v. *Strickland*, 420 U.S. 308 (1975), the panel concluded that the defendants were entitled to only a qualified immunity dependent on a demonstration of their reasonable and good faith grounds for their actions. In so doing, the Court rejected the principles of absolute immunity conferred on judges and prosecutors in *Pierson* v. *Ray*, *supra* and *Imbler* v. *Pachtman*, *supra*, based upon its unsupported and erroneous assertion that all officials of the "executive" branch of the government, including administrative judges and prosecutors, exercise discretionary powers that are more

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* Although the defendants moved to dismiss the complaint, there is sufficient evidence of record for the motion to be considered one for summary judgment. The evidence relevant to the immunity doctrine consists of an affidavit by Richard W. Davis, J., Attorney, Office of General Counsel, Department of Agriculture (Addendum to Appellee's Brief, pp. 10a-19a) which details the nature of each defendant's involvement and demonstrates that all actions complained of were official acts within the scope of each defendant's authority. The facts stated there are uncontradicted.

** During the pendency of this action in the district court, the final decision was issued in the administrative proceedings, affirming the Hearing Examiner's order granting the relief sought by the Department. Plaintiffs petitioned this Court to review that decision. On March 28, 1974, this Court granted the petition and vacated the administrative decision on the ground that the finding of willfulness was made in a proceeding instituted without the customary warning letter. *Economou* v. *Department of Agriculture*, 494 F.2d 519 (1974).

circumscribed and therefore less deserving of protection to ensure the performance of their functions and that administrative proceedings call for less difficult and pressured decision-making and have less impact on defendants than criminal prosecutions. (Sl. op. at 3408-09).

ARGUMENT

In determining whether an absolute immunity is available to public officials sued for damages arising out of their conduct, the Supreme Court has in recent cases applied a balancing test whereby the need to ensure that government officials can act in the public interest without constant fear of personal liability for the consequences of their actions is weighed against the need to provide a remedy to individuals who have been harmed by the misconduct of such officials. Compare *Scheuer* v. *Rhodes*, *supra*, at 246-49 and *Wood* v. *Strickland*, *supra*, at 316-22, with *Barr* v. *Matteo*, *supra*, at 571-74; *Pierson* v. *Ray*, *supra*, at 553-55; and *Imbler* v. *Pachtman*, *supra*, at 4253-56. Such balancing necessarily involves consideration of two factors: (1) the types of duties which the particular official performs and which give rise to the claims for damages and (2) the nature and source of the claims which the aggrieved citizen seeks to assert and the possibility of alternative remedies. As the discussion below will establish, where, as here, the complaint seeks damages arising out of the performance of judicial or prosecutorial duties or asserts claims based upon rights founded in common law rather than the Constitution, the immunity of a governmental official is absolute with respect to discretionary actions within the outer perimeter of his authority.

I. Judicial and Prosecutorial Immunity.

Recent developments in the doctrine of official immunity make clear that judges and prosecutors enjoy an absolute immunity from claims for damages arising out of the performance of their official duties. *Pierson* v. *Ray*, *supra*; *Imbler* v. *Pachtman*, *supra*. We submit that the considerations underlying such an immunity apply with equal force in respect to officials performing judicial and prosecutorial functions in the contest of an administrative law enforcement proceeding.

As the Court made clear in *Pierson* v. *Ray*, *supra*, the application of an absolute immunity to judges from claims under 42 U.S.C. § 1983 derived not only from the existence of the traditional common law immunity, but also from the need for such immunity for the proper performance of judicial functions:

> It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation. 386 U.S. at 554.

Precisely the same reasoning applies to administrative judges, whose discretion is frequently as broad or even broader, and whose decisions, in many instances, are as important in the fields which their agencies regulate and to the companies and individuals affected by them, as those of judges in criminal cases. See B. Schwartz, *An Introduction to American Administrative Law* at 221 (2d ed. 1962). In addition, while administrative judges do

not possess the nearly complete autonomy of Article III judges, nevertheless their independence and impartiality it guaranteed. See 5 U.S.C. §§ 554(d), 3105, and 7521; see also *Wiener* v. *United States*, 357 U.S. 349 (1958); *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). In this case, defendant Jack B. Bain, Chief Hearing Examiner, heard the evidence at the administrative proceeding and issued an initial decision; defendant Donald A. Campbell, Judicial Officer,* rendered the final decision. As in *Pierson* v. *Ray*, *supra* at 553, there is no allegation that these defendants played any role other than to decide the case before them. To the extent that error was committed in that proceeding, an adequate remedy exists in the form of a petition for review of the administrative decision, and plaintiffs have successfully pursued that remedy. Compare *Apton* v. *Wilson*, 506 F.2d 83, 94 (D.C. Cir. 1974). These defendants should therefore be granted absolute immunity.

Similarly, in *Imbler* v. *Pachtman*, *supra*, the Supreme Court balanced the competing interests and concluded that even when there was a charge of violation of constitutional rights, absolute immunity was necessary to allow prosecutors, like judges, the freedom to fulfill their responsibilities properly. As the Court explained:

> If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment *both in deciding which suits to bring and in conducting them in court.* The public trust

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* Although defendant Campbell was added to this action in the second amended complaint whose dismissal is the subject of this appeal, his name, as well as the names of the corporate plaintiffs, was omitted from the caption of the panel's opinion.

> of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own personal liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf. *Bradley* v. *Fisher*, 13 Wall., at 348; *Pierson* v. *Ray*, 386 U.S., at 554. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdong, his energy and attention would be diverted from the pressing duty of enforcing the criminal law. 44 U.S.L.W. at 4255. (emphasis supplied)

Although the Court was not required to delineate the precise boundaries of a prosecutor's immunity in *Imbler* v. *Pachtman*, it made clear that it extends first and foremost to the initiation of a prosecution. *Id.* at 4254, 4257. See also *Fine* v. *City of New York*, 529 F.2d 70, 73-74 (2d Cir. 1975). The central claim against the administrative prosecutors in this case was with respect to the initiation and continuation of the administrative prosecution.

The panel appeared to reject the application of absolute immunity to administrative judges and prosecutors for three reasons. First, the panel distinguished prosecution * of administrative enforcement actions from prosecution of criminal actions on the ground that administrative proceedings "of the type involved in the present case" usually turn more on documentary proof than on the veracity of witnesses and involve fewer constraint of time and information than a criminal prosecution (Slip.

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* The distinction clearly does not bear in any way on the question of judicial immunity.

op. at 3409-10, n.8). Quite apart from the fact that these factors were secondary considerations in *Imbler* v. *Pachtman*, *supra*, and have no bearing in any event on the critical question of immunity for the decision to initiate a prosecution (as opposed to its conduct), there simply is no factual basis whatsoever for this broad generalization. While the issue in this particular administrative proceeding—whether the respondent maintained the minimum capital balance prescribed by regulation—may have involved largely documentary proof, many, if not most, administrative enforcement proceedings involve extensive reliance on oral testimony * and often involve constraints of time comparable to those often involved in criminal trials.**

Second, the Court suggested that "executive" officials, including administrative judges and prosecutors, exercise less discretion than judges and prosecutors and that the outcome of administrative proceedings have less of an impact upon defendants and thereby create less of an incentive to sue than the results of criminal prosecutions. We respectfully submit that this generalization is also erroneous. In light of the frequent complexity of subject matter, the relative lack of doctrinal systematization, and the flexibility of evidentiary rules, administrative judges and prosecutors often exercise more discretion than their criminal counterparts.

Enforcement actions by the Securities and Exchange Commission against publicly held companies, broker-

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* See, *e.g.*, *Air East* v. *NTSB*, 512 F.2d 1227 (3d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3204 (1976); *George Steinberg & Son, Inc.* v. *Butz*, 491 F.2d 988 (2d Cir. 1974); *Nadiak* v. *CAB*, 305 F.2d 588 (5th Cir. 1962), *cert. denied*, 372 U.S. 913 (1963).

** See, *e.g.* suspension proceedings under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136d(c)(2); revocation of certification under the Federal Aviation Act, 49 U.S.C. § 1429(a); issuance of emergency temporary standards under the Occupational Safety and Health Act, 29 U.S.C. § 655(c).

dealers and accountants for violations of the securities laws, proceeding by the Food and Drug Administration against doctors and drug companies for selling unsafe or ineffective products, and actions by the Federal Trade Commission for penalties for antitrust violations or false advertising are only a few examples of administrative proceedings which are closely analogous, both in their intensely adversarial format and in the punitive aspects of the sanactions imposed, to criminal trials. These proceedings often result in far-reaching and precedent-setting decisions in such fields as antitrust, securities regulation, consumer protection and public health which are of major importance to the regulation of the industries involved. In view of the wealth and resources of many of the industries against whom enforcement actions will be taken and the stake these defendants have in these proceedings, it is particularly important that administrative judges be able to decide these cases, and that administrative prosecutors be able to initiate these cases, without the fear of having to later—or concurrently with their enforcement action—bear the burden of proof of establishing their good faith in a multi-million dollar damage suit.*

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* The decision to initiate the prosecution in the administrative proceeding was made by Richard E. Lynn, Alec C. Caldwell, and Richard W. Davis, Jr. with the participation of Murray A. Wolkis, Charles E. Robinson, Richard E. Kirchhoff, and T. Reed McMinn.

In addition, Caldwell, Robinson, Kirchhoff, and McMinn also participated in the decision to initiate the investigation, the audit part of which was conducted by Clement Gross and Edward P. Fitzpatrick. However, with the exception of one claim of trespass, none of the causes of action contained in the second amended complaint alleges that the administrative investigation was conducted in an improper manner. Rather, damages are sought against such investigative officials merely for providing the information upon which the administrative proceedings were based. We submit that the decision to initiate an investigation should be given an equal degree of protection as the decision to initiate

[Footnote continued on following page]

Third, in refusing to apply absolute immunity to administrative judges and prosecutors, this Court seemed to suggest that the immunity for judicial officers and prosecutors in *Imbler* was derived from the doctrine of separation of powers. Slip op. at 3408-09. It is clear, however, that such could not have been the rationale for immunity for criminal prosecutors who, like defendants herein, are executive officials, and if subject to suit, would not "be put in the uncomfortable position of being defended by some other branch of the government." Moreover, while the initiation of a prosecution may be thought of as being "intimately associated with the judicial phase of the criminal process," *Imbler* v. *Pachtman*, *supra* at 4256, the same association with the judicial process characterizes the commencement of an administrative proceeding which, as here, takes the place of a trial *de novo* in the district court and is directly reviewable by the Court of Appeals. Finally, since administrative agencies often perform the combined functions of all three branches of our government, an approach to official immunity based on the separation of powers doctrine, would, at least in the area of adjudication, still have to treat administrative

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a prosecution. The decision whether or not to prosecute must be based on information. If a prosecutor's freedom to make that decision is to be meaningful, he must also have the freedom to decide whether to investigate. A prosecutor fearful of investigating possible wrongdoing because of the risk of personal liability will have his freedom to decide on the initiation of prosecution impaired just as much as if he were subject to suit on the initiation of prosecution itself. Accordingly, those officials who participated in the decision to initiate the investigation should also be entitled to absolute immunity.

Finally, it should be noted that the second amended complaint does not specifically allege that defendant Earl L. Butz was involved in any of the actions for which damages are sought, and there is undisputed evidence in the record that he was not so involved. The complaint should therefore be dismissd as to him. *Black* v. *United States*, — F.2d —, Docket No. 75-6006 (2d Cir., April 23, 1976), Slip op. at 3391.

officials differently from other officials in the "executive" branch.

Thus, in determining the applicability of judicial and prosecutorial immunity to administrative officials, the focus must be on the *functions* performed not on the positions.* As the Supreme Court has said:

> "It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision," *Spalding* v. *Vilas*, *supra*, at 498—which must provided the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from . . . suits." *Scheuer* v. *Rhodes*, *supra*, at 247, quoting with approval, *Barr* v. *Matteo*, 360 U.S. 564, 573-74 (1959).

Where, as here, damages are sought for the commencement of an administrative enforcement proceeding and the decision and order rendered as a result thereof, the responsible officials are respectively entitled to the absolute immunity of prosecutors and judges.

II. Immunity from Common Law Suits for Tort.

The absolute immunity of Federal officials from suits sounding in common-law tort dates back to *Spalding* v. *Vilas*, 161 U.S. 483 (1896) and has been reaffirmed by the Supreme Court and by this Court on a number of occasions. See, *e.g.*, *Barr* v. *Matteo*, *supra*; *Ove Gustavsson Contracting Co.* v. *Floete*, *supra*; *Gregoire* v.

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* For this reason, the cases cited by the panel, Slip op. 3402 n. 3, are inapposite, since none of them involves a suit against executive officials performing judicial or prosecutorial functions.

Biddle, supra. In reversing the decision of the District Court and remanding all claims against the defendant officials, including common law as well as constitutional claims, the panel read the recent Supreme Court decisions in *Scheuer* v. *Rhodes, supra* and *Wood* v. *Strickland, supra* as having overruled this doctrine. We submit that in this the panel was in error.

In *Scheuer* v. *Rhodes, supra* and *Wood* v. *Strickland, supra,* the Supreme Court was concerned with the scope of official immunity in an action against state officials for allegedly having deprived plaintiffs of rights protected under the Constitution pursuant to 42 U.S.C. § 1983. Noting that *Barr* v. *Matteo* arose "in a context other than a § 1983 suit," in *Scheuer* v. *Rhodes, supra,* at 247, the Supreme Court expressly held that Section 1983 claims called for a strict standard of immunity, lest the section become "drained of meaning," *Id.* at 248, and in *Wood* v. *Strickland, supra,* at 322, the Court expressed its concern that "a lesser standard would deny much of the promise of § 1983." There is nothing in the holding of those cases which suggests that the absolute immunity of governmental officials from suits sounding in common-law tort has been abrogated.

Furthermore, the lower court cases decided since *Scheuer* indicate an emerging view of Federal immunity law that while certain officials (other than judges and prosecutors) enjoy only a qualified immunity for constitutionally-based claims, their immunity continues to be absolute for common-law tort claims. See *State Marine Lines, Inc.* v. *Schultz,* 498 F.2d 1146, 1159 n. 12 (4th Cir. 1974). Thus, the courts have continued to hold, on the authority of *Barr* v. *Matteo, supra,* that government officials have an absolute immunity from common law claims for damages. See *Berberian* v. *Gibney,* 514 F.2d 790, 793 (1st Cir. 1975); *Mandel* v. *Nouse,* 509 F.2d 1031, 1033 (6th Cir.), *cert. denied,* 422 U.S. 1008, *rehearing denied,* 44 U.S.L.W. 3206 (1975); *Peterson* v. *Wein-*

berger, 503 F.2d 45, 51 (5th Cir.), *cert. denied*, 44 U.S.L.W. 3201, *rehearing denied*, 44 U.S.L.W. 3305 (1975); *O'Bryan* v. *Chandler*, 496 F.2d 403, 414 (10th Cir.), *cert. denied*, 419 U.S. 986 (1974), *rehearing denied*, 420 U.S. 913 (1975).

Such a distinction between the scope of official immunity from constitutional as opposed to common law claims accords with the balancing test which underlies all of the decisions concerning this doctrine. While the interference by a governmental official with an interest of a citizen recognized by common law is not to be taken lightly, it weighs less heavily against the government's need for fearless administrative law enforcement than the deprivation of a constitutionally protected right. It is thus appropriate that the scope of official immunity should be absolute with respect to claims of the former and, in the case of officials other than judges and prosecutors, qualified with respect to claims of the latter. The second amended complain herein contains ten separate causes of action of which only four (the first, third, fourth, and fifth) allege a deprivation of a constitutionally protected right. Since as the district court found, the acts complained of were within the outer perimeter of defendants' authority and involved the exercise of discretion, all of defendant officials enjoy an absolute immunity with respect to the remaining common law causes of action, and those claims were properly dismissed on the authority of *Barr* v. *Matteo, supra.**

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* It is noteworthy that two of these causes of action (the eighth and ninth) seek damages for invasion of privacy and libel resulting from the publication of an allegedly misleading press release—the precise claim as to which the Court held there was an absolute immunity in *Barr* v. *Matteo, supra.* Moreover, as Justice Black noted in his concurring opinion, 360 U.S. at 577, this activity by public officials may well enjoy the protection of the First Amendment. Plaintiffs seek to convert this common law claim into one founded on the Constitution in two other

[Footnote continued on following page]

CONCLUSION

The same principles which have led the United States Supreme Court to confer absolute immunity on judges and prosecutors in the judicial branch of government should confer such immunity against all types of claims on judges and prosecutors in administrative enforcement actions. Furthermore, those officials, as well as other government officials, are entitled to absolute immunity from all claims founded on common law principles. The petition for rehearing *en banc* should be granted and the decision of the panel reversed.

Dated: New York, New York
June 21, 1976

Respectfully submitted,

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causes of action (the fourth and fifth) by alleging that the publication of allegedly false information violated plaintiffs' rights of privacy and due process of law. However, such a claim appears foreclosed by the recent decision in *Paul* v. *Davis*, 44 U.S.L.W. 4337 (1976) holding that one's reputation is not a constitutionally protected interest.

Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

CA 75-6050

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the
21st day of June, 1976 she served ~~a~~ two copies of the within Petition for Rehearing and one cy of Notice of Motion with Affidavit by placing the same in a properly postpaid franked envelope addressed:

Lewis M. Steel, Esq.
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New York, New York 10013

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And deponent further says she sealed the said envelope s and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this
21st day of June, 1976

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977